REMARKS/ARGUMENTS

By this paper, Applicant responds to the Office Action of January 17, 2007 and respectfully requests reconsideration of the requests made therein. The shortened statutory period runs through February 17, 2007. Accordingly, this response is timely.

Claims 2, 4 and 6-32 are now pending, a total of 29 claims. Claims 2, 18 and 25 are independent.

The Office's paper of January 17, 2007 is too incomplete to raise any *bona fide* requirement or to permit a response. Nonetheless, to ensure that prosecution is not delayed for any alleged failure to respond, Applicant responds and elects as follows, with traverse.

I. Traverse on Procedural Grounds – The January 17, 2007 Paper is Incomplete and Raises No Requirement Requiring Any Election

The MPEP specifies showings that must be shown for a procedurally-adequate requirement for Election of Species. They include all the showings required for a procedurally-adequate Restriction Requirement. MPEP § 809.02(a). These requirements include (MPEP § 803, emphasis added):

> There are two criteria for a proper requirement for restriction between patentably distinct inventions:
>
> (1) The inventions must be independent (see MPEP §802.01, §806.04, §808.01) or distinct as claimed (see MPEP §806.05 - § 806.05(i)) and
>
> (2) There must be a serious burden on the examiner if restriction is not required (see MPEP §803.02, §806.04(a)-(j), §808.01(a) and §808.02).

MPEP § 803 further requires (emphasis added):

> If the search and examination of an entire application can be made without serious burden, the examiner must examine it on the merits, even though it includes claims to distinct or independent inventions.

MPEP § 808 allocates the burden of proof to the examiner to show each of these elements: the examiner's paper must state "the reasons (as distinguished from the mere statement of conclusion).". In addition, MPEP § 806.04(a)-(f) mention a number of other showings required for an election of species requirement, including "unreasonable number of species" and "mutually exclusive."

The January 17, 2007 paper is simply silent on the required showings. Instead, the January 2007 paper substitutes novel reasons for election, reasons that apparently lack any foundation in any published PTO document. At a minimum, a paper without the required showings is incomplete. Because the analysis in the January 17, 2007 paper are not relevant to any recognized legal principles, Applicant is at a loss for a relevant response.

Further, an election requirement is only properly raised when the species are "mutually exclusive," that is, that "the claims must not overlap in scope." MPEP § 806.04(f). As the Office Action itself concedes in ¶ 5, the claims do overlap in scope. Thus, the Action itself concedes that no election requirement is properly raised.

No requirements exist, and no election is required. All claims may be examined on the merits.

II. Election with Traverse

In the event that any requirement is thought to be validly raised, Applicant responds as follows.

Paragraph 1. Applicant elects all claims readable on the embodiments of ¶ 1(b). No claim now pending recites a limitation excluding such embodiments, and thus all claims are readable on elected group 1(b).

Paragraph 2. Applicant elects all claims readable on embodiments "compris[ing] determining weighted average trading price." No claim now pending recites a limitation excluding such embodiments, and thus all claims are readable on elected group 2(e).

Paragraphs 3 and 4. The information requested in paragraphs 3 and 4 is unrelated to any factor specified as relevant in the MPEP, and requests identification of information that is not meaningful to examination. No requirement is raised in paragraphs 3 and 4. Nonetheless, to ensure that prosecution is not delayed for any alleged failure to respond, Applicant responds to the questions posed as follows. The "[exact] trading price … being monitored" elected for search is a synthetic price formed by taking a Gaussian-weighted average of the sum of three times the minute-by-minute sample variances of price above (or below) the higher (or lower) of the mode or median of the prices at which trades were executed during the respective minute, for a time window extending 17 minutes before and after the trade in question, for oil futures traded

on the Shanghai Futures Exchange. The "single species of exactly what the excess profits determination consists of" elected for search is the amount by which the execution price exceeds (or falls below) this synthetic price, convolved with the trade volume for all trades that exceeded (or fell below) the synthetic price during the 34-minute window. No claim now pending recites a limitation excluding such embodiments, and thus all claims are readable on the elected "price" and "excess profits."

Paragraph 5. Paragraph 5 of the Action requests that "a single species election must be closed ended" (Action of 1/17/2007, ¶ 5). Applicant declines to accede to examination of less than the scope required by the Office's written rules. The definition of "single species election" of ¶ 5 is contrary to the definitions of "generic" and "mutually exclusive" of MPEP §§ 806.04(d) and 806.04(f), and authorization to designate a "reasonable number of species" in 37 C.F.R. § 1.146 and MPEP § 806.04. As such, ¶ 5 appears to be outside the authority delegated to the Examiner by the Office, and no response is necessary.

If the Examiner is aware of any published PTO document that contradicts these sections of the Code of Federal Regulations and the MPEP to authorize a request of the type made in ¶ 5, Applicant requests identification of that published document. Otherwise, Applicant respectfully notes that federal agencies cannot rely on unpublished rules, and cannot make up new rules on the fly. The Due Process clause of U.S. Constitution "requires written standards whose availability provides notice to the interested public," for three reasons:

> [1] enabling the court to give proper review to the administrative determination; [2] helping to keep the administrative agency within proper authority and discretion, as well as helping to avoid and prevent arbitrary, discriminatory, and irrational action by the agency; and [3] informing the aggrieved person of the grounds of the administrative action so that he can plan his course of action (including the seeking of judicial review).

Lightfoot v. District of Columbia, 339 F.Supp.2d 78, 88-89 (D.D.C. 2004).

III. Conclusion

Should any requirement be made final, the Examiner is respectfully requested to state on the record that the claims in each group are patentable (novel and nonobvious) over each other.

Applicant requests that the application be passed to issue in due course. The Examiner is urged to telephone Applicant's undersigned counsel at the number noted below if it will advance

the prosecution of this application, or with any suggestion to resolve any condition that would impede allowance. In the event that any extension of time is required, Applicant petitions for that extension of time required to make this response timely. Kindly charge any additional fee, or credit any surplus, to Deposit Account No. 50-3938, Order No. CF/047 – 01-1047.

Respectfully submitted,

Dated: January 29, 2007

By: /David E. Boundy/
David E. Boundy
Reg. No. 36,461
(212) 294-7848
(917) 677-8511 (FAX)